IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	:	
	:	**CRIMINAL NO.**
v.	:	
	:	**96-202-1**
JERRELL A. BRESLIN	:	

MEMORANDUM

Broderick, J. **March 19, 1998**

On February 11, 1998, this Court sentenced Defendant Jerrell A. Breslin to 87 months in prison followed by three years supervised release. The Court further ordered that Defendant pay a special assessment in the amount of $850, and ordered restitution in the amount of $150,000. Defendant has moved for his release on bail pending appeal of his conviction and sentence to the Third Circuit Court of Appeals. For the reasons which follow, the Court will deny Defendant's motion.

On July 18, 1997, Defendant Jerrell A. Breslin, an attorney licensed to practice law in the state of Florida, was convicted by a jury of one count of conspiracy to commit wire fraud, in violation 18 U.S.C. § 371, twelve counts of wire fraud, in violation of 18 U.S.C. § 1343, and four counts of illegal monetary transactions, in violation of 18 U.S.C. § 1957. Defendant's conviction followed a six week trial at which Defendant had represented himself pro se, while being aided by stand-by counsel. The Court had allowed Defendant to represent himself pro se on the basis of Defendant's representations that he had significant trial experience and had worked for several

years as a criminal defense attorney, including working as a public defender in the state of Florida.

Following his conviction, Defendant Breslin moved for bail pending sentencing. The Court held a bail hearing and, on July 30, 1997, the Court set bail pending sentence in the amount of a $1,000,000 surety bond. As security, Defendant Breslin and four members of his family posted their homes, the estimated value of which totaled in excess of $1,000,000. Defendant's passport remained in possession of pretrial services, and Defendant's travel was restricted to Florida and the Eastern District of Pennsylvania.

On February 11, 1998, following the Court's imposition of sentence, Defendant Breslin, through his counsel, moved for bail pending appeal of his conviction and sentence. In light of the fact that Defendant has never filed a post-trial motion for acquittal or a motion for a new trial, the Court had not known at the time of Defendant's sentencing that Defendant had planned to file an appeal and was not able to anticipate which issues Defendant would raise on appeal. Accordingly, the Court scheduled a bail hearing to be held on February 17, 1998.

On the morning of February 17, 1998, the Court received a memorandum in support of Defendant's motion for bail pending appeal. In this memorandum, Defendant stated that he planned to pursue a number of issues on appeal. These issues included the Court's statements to Defendant in front of the jury regarding Defendant's attempts to "testify," the Court's denial of

Defendant's motion to dismiss the Indictment for prosecutorial misconduct before the grand jury, the Court's refusal to give Defendant's requested jury instruction regarding good faith, and the Court's restrictions on the scope of Defendant's cross-examination.

Because Defendant's memorandum in support of his motion for bail pending appeal did not include specific examples or citations to the notes of testimony, the Court could not consider the substance of Defendant's claims regarding the issue of the Court's comments to Defendant in front of the jury, or the Court's restrictions on the scope of Defendant's cross-examination. Accordingly, the Court asked that defense counsel submit a supplemental memorandum and include relevant citations to the notes of testimony.

On March 4, 1998, Defendant's counsel filed a supplemental memorandum in support of Defendant's motion for release pending appeal. In this supplemental memorandum, Defendant focuses only on the issue of whether the Court prejudiced Defendant and deprived him of his constitutional rights by interrupting Defendant several times during the course of his opening statement and cautioning him not to "testify."

The issue of bail pending appeal is addressed in 18 U.S.C. § 3143(b). Section 3143(b) provides in relevant part:

> ... the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal

> or a petition for a writ of certiorari, be detained unless the judicial officer finds-- (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c)of this title; and (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in (i) reversal; (ii) an order for a new trial; (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process...

Under Section 3143(b), the defendant seeking bail bears the burden of showing: (1) by clear and convincing evidence that he is not likely to flee or pose a threat or danger to the safety of any other person or the community if released; (2) that his appeal is not for purpose of delay; (3) that his appeal raises a substantial question of law or fact; and (4) that if the substantial question is determined favorably to him on appeal, the decision will likely result in reversal or an order for a new trial as to all counts on which imprisonment has been imposed. United States v. Miller, 753 F.2d 19,24 (3d Cir. 1985). As the statute makes clear, the Court need not determine whether a defendant's appeal raises a substantial question of law or fact if the defendant has not shown by clear and convincing evidence that he is not likely to flee or pose a danger to the community.

In determining whether a defendant's appeal raises a substantial question of law or fact for purposes of Section 3143(b), the District Court need not predict the likelihood of its rulings being reversed on appeal. United States v. Miller, 753 F.2d. at 23. The District Court need only consider whether

Defendant raises an issue on appeal which is "debatable among jurists," or "adequate to deserve encouragement to proceed further." United States v. Smith, 793 F.2d 85, 90 (3d Cir. 1986).

In the instant case, the Defendant has not shown by clear and convincing evidence that he is not likely to flee. Although Defendant and his relatives have again offered to post their homes as security for Defendant's bond, the Court no longer feels this bond is sufficient to ensure that Defendant will not flee. Developments which have occurred since this Court granted Defendant bail pending sentence have given the Court serious concerns as to Defendant's risk of flight.

First, the Court must consider the fact that Defendant now faces 87 months imprisonment. This is a significant amount of time in prison-- much more than Defendant had asked the Court to order, and, though at the lowest end of the Sentencing Guidelines, perhaps more than Defendant had expected the Court to impose. Defendant may now have an incentive to flee which he did not have before.

Moreover, as noted in the presentence report in this case, Defendant has refused to provide the Court with full information regarding his financial status. Although Defendant submitted to the probation department a statement of his present financial earnings, assets and liabilities, he has failed to turn over information as to the disposition of certain assets which

Defendant disposed of while this case was under investigation. As this Court is well aware, Defendant has previously kept bank accounts in foreign countries, including accounts in the Cayman Islands. Testimony at Defendant's sentencing hearing revealed that Defendant had kept the existence of these foreign accounts unknown from his personal accountant. In light of Defendant's participation in the multi-million dollar fraud which is the subject of the instant Indictment, the Court has good reason to believe that Defendant may have assets hidden which could enable him to flee, and perhaps reimburse his family members for the value of the homes which they posted to secure Defendant's bond.

Furthermore, the government has represented to this Court that Defendant is the target of an investigation, and may face indictment, in the Northern District of Florida for his participation in a similar fraud scheme. In his supplemental memorandum, Defendant represents to this Court that he has, through his counsel, contacted the responsible Assistant U.S. Attorney in Northern Florida and offered to fully cooperate and surrender to any new charges filed. These assurances from Defendant, however, are not sufficient to allay this Court's concerns as to Defendant's risk of flight.

Accordingly, Defendant has failed to show by clear and convincing evidence that he is not likely to flee if he is released on bail pending disposition of his appeal.

Furthermore, Defendant's appeal does not raise a substantial

question of law or fact, as required by Section 3143(b). Defendant's claims on appeal do not present issues which are fairly debatable among jurists, or adequate to deserve further consideration.

Although Defendant referred to many issues which he plans to raise on appeal, the Court need only address one issue at length-- whether the Court prejudiced Defendant and deprived him of his constitutional rights by cautioning Defendant in front of the jury during his opening statement.

Defendant delivered his opening statement on July 9, 1997, following the close of the prosecution's case-in-chief. According to Defendant's supplemental memorandum, the Court prejudiced Defendant in the eyes of the jury by telling him before he began his opening statement that his opening statement was to be a statement and was not to be an argument. Defendant contends in his supplemental memorandum that this comment by the Court marked the beginning of an "onslaught against the defendant's opening statement" in which the Court, in the presence of the jury, interrupted Defendant during the course of his opening statement and warned him not to "testify" before the jury. Defendant contends that the Court's repeated cautionary instructions regarding Defendant's attempts to testify implied that Defendant had an obligation to testify and thus prejudiced Defendant in the eyes of the jury.

As a review of the record makes clear, however, the Court's comments and cautionary instructions were absolutely necessary in

light of Defendant's repeated attempts to testify during the course of his opening statement.

Before beginning his opening statement, Defendant, a licensed attorney, represented to the court that he understood the purpose of the opening statement, and understood that it was not to be an argument. Defendant told the jury before he began his opening statement that his statement was not testimony, that he was not testifying and that he would not testify.

Despite Defendant's representations, however, and despite the fact that Defendant was, by his own admission, an attorney with much experience in criminal trial practice, Defendant began testifying before the jury almost immediately after commencing his opening statement. Defendant said to the jury:

> So who am I? I'm one of you. If you leave Philadelphia and head north and you go up 309, you will come to Schuylkill County. There is a little town called Tamaqua. That is where I was born. I went to Catholic grade school in Tamaqua, St. Jerome, Marian Catholic high school. I spent a year in the seminary, then I went to Penn State. Graduated from Penn State, and then I went to the University of Miami School of Law, and I graduated down there after I got out of law school.

Upon the government's objection, the Court instructed Defendant that he was not to testify to evidence which was not in the record, though he could tell the jury that he planned to present evidence as to his background.

Although Defendant stated that he understood the Court's instructions, Defendant continued to testify as to his background, telling the jury that he had worked as a public

defender upon graduation from law school, then gone into private practice. Defendant continued:

> And around 1988, I did preliminarily trial litigation. In 1988, I just thought that it was time I used my talents for something other than--

The government objected on the ground that Defendant was testifying as to his own thoughts and feelings. The Court again instructed Defendant that he was not to testify during his opening statement. The Court patiently explained to Defendant:

> You have a right to make an opening statement, but you cannot-- I mean, you probably don't realize it, you have been giving them [the jury] information that is not in the record.

Again, Defendant said that he understood the Court's cautionary instruction. Yet, again, Defendant proceeded to testify. Defendant began to tell the jury why he agreed to work for Turnbull & Sons (the corporation which Defendants used to carry out their fraud):

> And most importantly, when I came to Philadelphia, Turnbull and Sons was already doing business with Cooper Horwitz. What I saw when I got there was one of the biggest, if not the biggest, mortgage brokers in the world, bringing their clients to Turnbull and Sons. That's what I saw. And that was, simply put, enough for me.

Defendant was clearly presenting evidence to the jury as to his own thoughts and impressions-- evidence to which no one but Defendant could testify. Not surprisingly, the government again objected. The Court, recognizing Defendant's trial experience, told Defendant:

> I know you understand me and you just can't continue what you are doing.

The Court explained to Defendant that he could get on the witness stand, be sworn in and testify, but he could not testify during the course of his opening statement.

At a side-bar conference, which was requested by counsel for Defendant's co-defendant Leslie Mersky, the Court again explained to Defendant Breslin:

> You have a right to call them [witnesses] and ask them relevant questions... You don't have a right, and I'm going to repeat it again, you don't have the right to stand there and testify, and maybe you don't think that you are testifying, but you are.

The Court's repeated explanations had little effect on Defendant. Although Defendant told the jury following side-bar that he was not attempting to testify, Defendant soon began testifying once again. Defendant attempted to explain to the jury the Financial Facility Agreement which Defendants used to obtain up front fees from fraud victims:

> The reason that the original Financial Facility Agreement is kind of -- is a little strange is because it was translated by people that were not used to translating financial documents. Apparently, it was just a regular straight translator, and German is quite a complicated language. The Financial Facility Agreement is...

Once again, the Court cautioned Defendant:

> You are testifying and you can't do that. And this is the last time I'm going to tell you. And the Court has been trying to help you through this opening, and openings of a party who is representing himself are very difficult.

At a second side-bar, the Court again explained:

> If you want to say that we will show you who prepared it originally, and where it was prepared, you can say

> that. Yes, but you can't-- by the way, I know you are an intelligent man, and I know you know what I'm saying.

The record shows that the Court demonstrated great patience with Defendant during his opening statement, and exercised great care in ensuring that the jury was not prejudiced against Defendant. Following the second side-bar, the Court granted Defendant's request for a five minute break. Immediately after the break, the Court gave the jury the following instruction:

> I just want to point out to you so there is no misunderstanding, the government has the burden of proof to establish the guilt of the two remaining defendants beyond a reasonable doubt. And a defendant is presumed innocent until such time, if ever, the government establishes guilt beyond a reasonable doubt. And a defendant has the constitutional right to remain silent, and a defendant cannot be compelled to testify. The defendant does not have the burden or the duty to call any witnesses, or to produce any evidence, and the law does not compel a defendant in a criminal case to take the witness stand and testify. And the fact that I said he could take the stand, ask himself questions, yes, he can do that, but he can't be compelled to do that. That is his option and no inferences of any kind may be drawn from the failure of a defendant to testify...

This instruction, given in the middle of Defendant's opening statement, was in addition to the Court's instructions given to the jury at the commencement of the trial and at the end of the trial as to the government's burden of proof, a defendant's absolute right not to testify, and the fact that no inferences should be drawn from a defendant's decision not to testify. Contrary to Defendant's assertions in his supplemental memorandum, the Court's instruction to the jury given in the

middle of Defendant's opening statement was neither standard nor tame. The Court specifically referred to the comments which the Court had made regarding Defendant's option to take the stand, and told the jury that it was not to infer from those comments that Defendant had any obligation to testify.

Defendant's assertion that the Court limited Defendant to identifying the subject areas that would be covered by testimony, and forbid Defendant from telling the jury the substance or details of the anticipated testimony in his opening statement misrepresents the nature of the Court's instructions. The Court never prohibited Defendant from disclosing the substantive nature of anticipated testimony. Rather, the Court correctly prohibited Defendant from disclosing his own thoughts, impressions and interpretations, and told Defendant that he could describe anticipated evidence which would be presented during his case, but could not present the evidence himself to the jurors without taking the stand and testifying. The Court's instruction is undoubtedly correct.

Having reviewed the record, the Court has determined that its cautionary instructions and statements made to the Defendant during his opening statement were necessary and appropriate responses to Defendant's persistent efforts to testify and present argument to the jury. Accordingly, the Court does not believe that Defendant raises a substantial issue by challenging on appeal the Court's statements made to Defendant during his opening statement.

Additionally, the remaining claims which Defendant raises on appeal do not present substantial questions of law or fact for purposes of 18 U.S.C. § 3143(b). With respect to Defendant's claims of prosecutorial misconduct before the grand jury, the Court addressed these claims in its February 7, 1997 memorandum and order denying Defendant's motion to dismiss the Indictment. In its memorandum, the Court considered Defendant's grand jury claims, and found them without merit. Defendant's challenge to this Court's findings do not raise a substantial issue on appeal.

Additionally, Defendant's challenges to the Court's jury instructions do not present a substantial question of law or fact. Defendant contends that the Court erred in its refusal to give an instruction that if Defendant acted in good faith, Defendant should not be found to have the required intent to defraud. However, the law in the Third Circuit is clear that a good faith instruction is not required when the Court has properly instructed the jury as to the mental elements of the crimes charged, and those elements are inconsistent with a defendant's good faith. As the Third Circuit has noted, "[w]hen a jury has determined that an accused has intended to cheat his victim, the possibility that the accused also acted in good faith has been eliminated," and the good faith instruction becomes superfluous. United States v. Zehrbach, 47 F.3d 1252, 1261 (3d Cir. 1995).

Defendant also contends that the Court unfairly prejudiced Defendant when it instructed the jury that Defendant's status as

an attorney did not give him any license to violate the law. The Court gave the following instruction:

> I instruct you that an attorney has a professional duty and responsibility to represent his client's interest zealously within the bounds of the law. However, an attorney is not above the law and, like everyone else, an attorney may not commit or assist in the commission of a criminal offense.

The Court can discern no basis on which Defendant could challenge this true and correct instruction. Accordingly, Defendant's challenges to the Court's jury instructions do not raise a substantial issue for purposes of appeal.

Finally, the Court notes that Defendant has failed to show this Court that his challenges to the Court's restrictions on the scope of Defendant's cross-examination raise a substantial question of law or fact. In his February 17, 1998 memorandum in support of his motion for bail, Defendant raises the issue of the Court limiting the scope of Defendant's cross-examination of government witnesses. However, in his March 4, 1998 supplemental memorandum, Defendant states that he can not brief the issue "[d]ue to the number of volumes of testimony and difficulties in acquiring a copy promptly at an affordable price." Defendant has thus failed to show that this is a substantial issue on appeal.

For the reasons stated above, the Court will deny Defendant's motion for bail pending appeal.

An appropriate Order follows.